No. 173.

Brief of Gordon for Appellees

Filed Dec. 14, 1897.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 173.

PHILIP LEVIS, APPELLANT,

vs.

CHARLES R. KENGLA ET AL.

Appeal from Court of Appeals for the District of Columbia.

BRIEF FOR APPELLEES.

J. HOLDSWORTH GORDON,
Counsel for Appellees.

LAW REPORTER PRINT.

SUPI

On
filed
R. K
1876
the
day
Wea
Char
dolla
ten
in t
a no

IN THE

UPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 173.

PHILIP LEVIS, APPELLANT,

vs.

CHARLES R. KENGLA ET AL.

Appeal from Court of Appeals for the District of Columbia.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

On March 29th, 1893, Philip Levis, the appellant herein, led an original bill against George M. Kengla and Charles . Kengla, in which he alleges that on the 13th day of May, 876, he was the owner of certain real estate, described in he bill, containing about sixty acres. That on said 13th ay of May, 1876, he conveyed the same to one Joseph Veaver, to secure unto the said George M. Kengla and harles R. Kengla, his promissory note for three hundred ollars, to order of said Kenglas, in one year after date, with n per cent. interest. That at the date of said conveyance trust, said real estate was already encumbered to secure note of two thousand dollars ($2,000), given by the said

Levis and wife, payable in three years from October 29th, 1875, with ten per cent. interest. That on the 29th day of October, 1877, said promissory note for three hundred ($300) dollars being overdue and unpaid, said Weaver, trustee, by direction of the said Kenglas, undertook to make public sale of said real estate, on the premises, at auction, at the hour of one P. M. of said day. The appellant then alleges as follows (Rec. 106, paragraph 5):

> "But there being present no bidders or any persons interested in the purchase of said property except the defendants, the threatened sale was objected to by plaintiff, and was only permitted to be made, without protest, upon the verbal statement by defendants that they only desired to obtain out of the property, the amount of the encumbrances thereon, and that if the said sale was permitted to be made they, said defendants, would reconvey the same to plaintiff, or so much thereof as was left, after sufficient had been sold by them to satisfy the total indebtedness in full then against said property, together with the costs of sale. Whereupon, relying upon said promise, plaintiff suffered an informal sale of said property to be made to the defendants, by said trustee, at and for the sum of $1,000.00, subject to the said deed of trust for two thousand dollars. No deed, however, was made by said trustee to said defendants of said property until the 17th day of January, 1878, when the same was executed by him to said defendants, and is now of record among said land records," etc.

The appellant further alleges that the property was worth some ten or twelve thousand dollars at the time of the sale; that he does not know that any part of the one thousand dollars was ever paid, and that no account has ever been made to him. That on the 26th day of May, 1879, the Kenglas executed a deed for about twenty-seven acres of the property to one Thomas L. Hume, for a cash payment of $356.89, and a deferred payment of $2,400.00, represented

by the three promissory notes of said Hume, secured upon the property.

Appellant further states (Rec. 107, par. 9) that he:

> "continued in possession of the remaining portion of said property for nearly a year after said informal foreclosure sale, *when he moved therefrom on the receipt of a notice to quit from said defendants.*"

It is further alleged in the bill that ever since the last mentioned sale to Hume the Kenglas have continued in possession of said property, and have made no attempt to sell the same until within a few days of the filing of the bill, when they commenced negotiations for sale at a price largely in excess of sufficient to pay off the whole of what remained unpaid of the said indebtedness of $2,300, with interest and costs. It is further claimed that the sale of about two acres of the property would pay off the indebtedness remaining, and that it would be inequitable to permit the Kenglas to sell the whole of the property, and to do so would result in great loss to the appellant, for which he has no remedy except by the intervention of the court. He therefore prays: That the contemplated sale be restrained, and (Rec. 108)—

> "that an accounting may be taken of how much of said indebtedness of $2,300, with interest and costs of sale, and any other outlays of defendants on account thereof, have been satisfied by defendants out of the real estate hereinbefore described, and on the coming of the said account plaintiff may be permitted to pay said amount, and on the payment thereof that the defendants be required to reconvey said land to the plaintiff."

To this original bill the defendants, George M. Kengla and Charles R. Kengla, filed their answer on the 25th day of April, A. D. 1893 (Record, 108), admitting that they were the holders of said note of three hundred dollars and also the note for two thousand dollars named in the bill.

That said note of three hundred dollars and interest being overdue and unpaid, they requested the said trustee, Joseph Weaver, to offer the real estate upon which the same was secured (being the real estate named in the proceedings), at public auction. That the said property was sold to them by the trustee, for the sum of one thousand dollars, subject to the sum of two thousand dollars, secured by the said prior trust. That the sale was made and purchase had in good faith, and after all the requirements of the deed under which the same was offered. That they complied with the terms of sale and received a conveyance from the trustee. They say they know nothing of the alleged failure of the trustee to account with Levis, but they never heard any complaint fram him on that account, or on account of the conveyance of the property to them by deed of January 17, 1878; nor had the plaintiff made any claim of interest in the property since the said conveyance, until filing of present suit.

They deny that at any time before the sale there was any understanding, agreement, or suggestion of any kind whatsoever, between them and Levis, to impeach, or qualify the absolute purchase of the property by them, for their own use and benefit. And they declare (Rec. 110):

> "*That after said sale was made* the plaintiff informed them that he believed he could obtain a purchaser for said property at a greater price than the same had been sold to them; and wishing the plaintiff to obtain as much as possible for said property, they informed him that if he could obtain such purchaser within two weeks from the day of sale they would convey to such purchaser, and turn over to him the increased price obtained."

They further say that at the end of about two weeks the plaintiff informed them that he was unable to obtain a purchaser, and thereafter they heard nothing further from him in regard to the sale. They deny the property to be of the

value alleged, and say the price paid was fully as much as could be obtained at that time. They also admit the sale to Hume of about twenty-seven acres of the property, and at the date and at the price named, which price was obtained owing to the peculiar circumstances connected with the location of the land as an exit from Hume's property. They allege that while Levis had full knowledge of the sale, conveyance and consideration, no objection was ever presented or inquiries made in reference thereto, although the parties have been in constant communication. They further admit that the said Levis remained on the property for about one year after the sale. That this was permitted by them on account of the friendly relations that had always existed between the families. That Levis was in reduced circumstances, and was allowed to remain on the premises from friendly and charitable considerations. That, subsequently, desiring to possess themselves of the land, they gave Levis a notice to quit, and he thereupon removed from the same, making no protest against leaving, nor any claim to the property, since which time they have been in full and uninterrupted ownership and possession thereof. The defendants deny any and all claim of right, title or interest in the premises made by the plaintiff, and aver that the claim made by the plaintiff is a stale one. That the agreement for two weeks' allowance to the plaintiff, wherein to secure a purchaser, expired by its own limitation, and was not such an agreement as would bind real estate under the provisions of the Statute of Frauds. They claim that the plaintiff has failed to show in his bill anything entitling him to relief, and pray that the bill be dismissed against them with costs.

Subsequent to filing of replication George M. Kengla died and an amended bill was filed bringing in his infant heirs at law.

The amended bill differs from the original bill in but few particulars, the only material change in allegation being

contained in the sixth paragraph, wherein the plaintiff alleges that the defendants (Kenglas) at the sale agreed (Rec. 3)—

> "that if he (Levis) would permit them to go through the form of a sale, the said defendants *would take and hold* the same for the benefit of the complainant, and would reconvey the same to the complainant, or so much thereof as was left after sufficient had been sold to satisfy the defendant's claim, together with costs of sale, whereupon and relying upon the promise of the said defendants that they *would take and hold said property in trust for the use and benefit of the complainant*, he permitted an informal sale of said property to be made to said defendants by said trustee, Weaver."

Answers were filed by the parties defendant, the survivor to the original bill, Charles R. Kengla adopting in full and making as a part of his answer, the statements at large set forth in his answer, made jointly with his brother, to the original bill.

After replication testimony was taken, and cause came up for hearing. At the hearing motion was made for permission to file an additional amendment. Time was granted for the consideration of the same, and upon consideration of the proposed amendment the application for permission to file was denied, and the cause then coming on to be heard, and being considered by the court, the bill and amended bill were dismissed, with costs. From that decree appeal was taken to the Court of Appeals for the District of Columbia, which court affirmed the decree below (Rec. 121). From the latter decree appeal is taken to this court.

I.

It is claimed on part of appellees that no such agreement, as alleged between the plaintiff and defendants is established by the evidence and surrounding circumstances, but

that on the contrary, the position taken by the defendants in their answer is shown to be correct.

[In the record, as printed, a portion of the testimony for the defendants (Kenglas) precedes that for the complainant, Levis, though an examination of the dates, upon which the testimony was taken, will show that this is merely an error in the examiner in putting the testimony together.]

It will be observed that in the original bill the claim is made that the defendants agreed to "convey the property to the plaintiff or so much as was left," etc., while in the amended bill it is claimed that the defendants took the property, and "were to hold the same for the benefit of the complainant," etc. The evident intention being, if possible, to change the character of the transaction from a contract for reconveyance, as set up by the original allegation, to one in the nature of a trust, as sought to be set up in the lattter allegation. Whichever of these positions may be selected by the plaintiff, the evidence as enlightened by other circumstances, fails to establish either.

On the one side we have the testimony of Levis, wherein he declares:

> "At the time of the sale there was no one there to bid on the property, being no one only what was really interested and had to be there. I object to the sale; so Mr. Kengla asks me if I could raise $100 or $150, which I told him I could not do. Then he asked me to let the sale go on; that he did not want the land and would have nothing from it, only what I owed him; that he would sell it or I should sell it, and I was to have the benefits, all over and above what I owed him, and, of course, the expenses of the sale, etc., was mentioned." (Record, p. 28.)

The above statement embodies the claim of the plaintiff, with immaterial variations, set up by his testimony. As corroborative evidence the testimony of J. R. Purcell is introduced. This witness claims that some sort of an

arrangement was made between the parties, but what it definitely was, fails entirely to show.

He states (Rec. 61):

> "There being no bidders present, there was some arrangement entered into between Levis and Kengla by which the property was either cried out—was supposedly turned over to the Kenglas. I remember that just before this transaction took place I heard a conversation between Mr. Hume, who owned the property adjacent to this, and the interested parties; . . . the substance of which conversation was that while he was not bidding on the property, that he desired to take that part of the property which was cut off by the road leading to his farm, then named Tunlaw. . . . I remember now the transaction and the conversation that happened (Rec. 62). . . . In substance it was that Mr. Kengla did not desire—and, indeed, he so stated to me up there—he did not desire the land; only wanted his money out of it, and he wished to impress upon Mr. Levis during our walk from there that he would only act as 'a friend to his interest in this matter.'"

These two witnesses, Purcell and the complainant, are the only ones to testify to the alleged agreement upon which the suit is based. It is submitted that their testimony does not support the allegations of the bills. Indeed, there is every reason to believe that much of Purcell's testimony is merely the creation of his own fancy, aided by subsequent information that has come into his possession, and has been manufactured purely to meet the emergencies of the present case; for, as will be observed, he testifies that Mr. Hume was present at the sale, and expressed his desire to purchase a portion of the property. Mr. Kengla, on the contrary, has no recollection of Hume's presence, and swears most positively that the subject of the purchase by Hume was not mentioned until about two years after the property had been conveyed to the Kenglas. Levis makes no mention of

Hume's presence, and virtually excludes him from the list of those attending the sale; for he says (page 28 of Record), those who were present were:

> "Mr. Thomas Dowling, the auctioneer; Mr. Joseph Weaver, the trustee, and his son; Robert Kengla, and George Kengla. There was another man; I don't know his name; myself and a colored man."

The unknown man could not have been Mr. Hume, for Levis knew him, having, he claims, had former negotiations with him (Rec. 34, 35).

As a further doubt upon the evidence of Purcell we have (page 28) Levis' testimony that Kengla offered to postpone proceedings under the trust should Levis raise $100 or $150 for him. Can it be believed that had Mr. Hume been present and so anxious for a portion of the property, as claimed, that the small sum needed as a condition for the postponement of the sale would not have been forthcoming? Or that with the prospect of another purchaser, the Kenglas, who appear from the whole evidence more desirous to secure their money than to take the land, unprofitable and unmarketable as it is shown to have been, would not have willingly waited and have aided and encouraged the consummation of such negotiations?

It is further submitted, that had any such arrangement, as claimed, been entered into, it is unreasonable to believe that Purcell, an avowed creditor of Levis, should have permitted the Kenglas to have so long remained in full and undisputed control and possession of the property, when he had knowledge of the fact that his debtor held an equitable interest in a very valuable estate—far greater than his debt could possibly be. The whole testimony of this witness is unworthy of credit, and little faith, if any, can be placed in what he has said. Surely his testimony could not be a safe guide for the court.

To meet the case of the plaintiff we have the sworn answer of the defendant, George M. Kengla, now dead, made

jointly with his brother, the defendant Charles R. Kengla. We also have the testimony of the latter in which he denies the statement of the plaintiff as to the character of the agreement, and presents his claim, as to what did really occur. He states (Rec. 80 and 81), that Levis made no objection to the sale. *That after the sale—*

> "Levis thought the place did not bring as much as it ought to do. We told him we didn't want anything but what was right, and that the place had brought all it would bring; but to show him that we did not want anything more than right we gave him time to sell it, to sell the property, and if he could get more for it, all over that he got he could have. We called the trustee up and we asked him what he thought we ought to give him" [meaning how much time]. "The trustee thought a week would do. . . . Then we extended him a little longer, and we agreed on two weeks."

It is respectfully submitted that the truth of the evidence given by Mr. Kengla is shown by all the surrounding circumstances of the case.

The auctioneer, an old and experienced salesman, Thomas Dowling, testifies that he remembers no protest or objection to the sale being made by Levis—that had such been make he would, under his usual rule, have made note thereof, and that he finds none entered in the record book of the sale; thus corroborating Kengla. (Record, p. 76.) We find that Levis immediately endeavored to find a purchaser in one Dr. Triplett, and that after considerable negotiations with him the sale fell through, owing to the declination of the proposed purchaser to consummate the matter. (Testimony of Levis, pp. 29–30, and of Kengla, p. 81.) During all this time no deed had been delivered, the parties undoubtedly hoping that a purchaser might step in to take the Messrs. Kenglas' place. Nothing being accomplished, on January 17, 1878, the trustee, Mr. Joseph Weaver, conveyed the property to the defendants, Kenglas, subject to the prior

trust of $2,000 (Record, p. 98), and this deed was duly recorded. The plaintiff continued to remain on the property for about one year after the sale (Levis' testimony, p. 31); and then, *upon written notice to quit*, from the Kenglas, gave up the property to the latter. (Bill of Levis, Rec. 107, par. 9, and Kengla's testimony, pp. 81, 82.) No protest appears to have been made against this exercise of ownership by the Kenglas; nor is it claimed that any objection was made to the surrender of the property. From that time—say in October, 1878—to the date of filing the original bill in 1893, fifteen years, not one word of protest or claim of ownership was made by Levis, so far as the record shows. Again, on the 26th day of May, 1879, the defendants sold a portion of the land to one Thomas L. Hume, for $2,780. The deed for this conveyance was placed on record, and Levis knew of the sale. (Levis' testimony, p. 41.) The testimony further shows that from the sale to the date of bringing the present suit, March 29, 1893, all the taxes had been paid by the Kenglas, none by Levis. No offer to settle, according to his alleged agreement, had been made; no ownership attempted. A surrender, on notice, to the Kenglas, and no claim of any kind presented.

It is respectfully submitted that the plaintiff has utterly failed to establish any such agreement as alleged in his bill, or amended bill, and the weight of evidence shows that his contention now is but an afterthought, born of the desire to avail himself of the increased value of the land. We do not discuss the matter of the alleged inadequacy of the consideration paid for the property, for we believe the evidence shows that its market value was obtained, and, further, we do not think it an element entering into the merits of the issue presented.

The court below, commenting on the facts of the case, very justly says (Rec. 119):

> "The complainant has not established his case by any such preponderance of testimony as is required

by the rules of law to overthrow the title of the defendants. On the contrary, the preponderance of of testimony is wholly against him. It is unreasonable to suppose that the defendants, having a good security as it stood, would have converted themselves into permanent trustees, for an indefinite period, for the sole and exclusive benefit of the complainant, the latter never at any time concerning himself with the payment of interest or taxes, or the care of the property in any way for fifteen years. To establish such an arrangement as this, very positive and satisfactory evidence would be required; and without going into any examination of the testimony, it is sufficient for us here to say that, in our opinion, the testimony wholly fails to establish any such arrangement, or any arrangement whatever, upon which a court of equity would be justified in acting. It would seem to be a conclusive answer to the complainants' pretensions that when within a year after the sale, and when they deemed their indulgence to him to have reached its legitimate limit, they gave him notice to quit the premises, and thereby plainly intimated to him that they regarded any interest which he might have had in the premises as at an end, he submitted to the notice, without protest, and acquiesced in his exclusion from the property. This conduct, coupled with his utter disregard thereafter of any liability either in regard to the property or in regard to the indebtedness, is wholly inconsistent with the existence of any such trust arrangement as that which he claims to have been made between him and the defendants."

Pages of argument could not more forcibly present the glaring inconsistencies between the claim of the appellant and his course of action, or show more clearly the utter want of probability in the truth of his present contention, than the language of the court, above quoted.

As this honorable court says, in Purcell *vs.* Miner, 6 Wall. 517, referring to an attempt to establish a parol contract for conveyance:

> "It is plain that a party who claims such interference has the burden of proof thrown upon him.

> He knows that the law requires written evidence of such contracts, in order to their validity. . . . When he requests a court to interfere for him, and save him from the consequences of his own disregard of the law, he should be held rigidly to full, satifactory, and indubitable proof. First: Of the contract and its terms. Such proof must be clear, definite, and conclusive, and must show a contract, leaving no *jus deliberandi*, or *locus penitentiæ*. It cannot be made out by mere hearsay, or evidence of the declarations of a party to mere strangers to the transaction, in chance conversation, which the witness had no reason to recollect from interest in the subject-matter, which may have been imperfectly heard, or inaccurately remembered, perverted, or altogether fabricated."

It is respectfully submitted that the appellant has wholly failed to establish any such agreement as by him set up in his pleadings, and that the decree below should be affirmed.

II.

It is further submitted that even should the court consider that the appellant has established, by a preponderance of evidence, the existence of such an agreement as set up, it would not be enforced, by an equity court, in the face of the direct and positive prohibition of the Statute of Frauds. It matters not which of the positions the appellant may take. Whether the alleged agreement was one to reconvey in a certain contingency, as stated in the original bill; or one to hold the property in trust, for the sole use and benefit of the appellant, as claimed in the amended bill, and thereafter to reconvey; it would be equally obnoxious to the Statute of Frauds, as an agreement relating to lands, which was not reduced to writing and signed by the party, to be charged therewith. There is no pretense that the alleged agreement, whatever it may be claimed to be, was in writing, nor has any memoranda, touching the matter, been offered, and the statute has been specially pleaded.

(A) If the alleged agreement be taken as a contract to reconvey, it is subject to the operation of the statute.

The fourth section provides that no action shall be brought whereby to charge the defendant:

> "Upon any contract of sale of land, tenements or hereditaments, or any interest in, or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized."

In May *vs.* Sloan, 101 U. S. 237, this Honorable court says:

> "If the case depended upon the parol agreement set up by the complainant, whereby he claims that Asa May bound himself to convey the land to him, no relief would be granted on this bill. The Statute of Frauds would be a complete bar. The defendant in his answer denies that any such agreement was made. Such a denial is as effective for letting in the defense as if the Statute of Frauds had been pleaded."

And in Howland *vs.* Blake, 97 U. S. 624, the same doctrine is declared. In the latter case the claim was, that one Taylor loaned Howland $7,000 upon a mortgage, to enable the latter to complete the erection of certain buildings, the entire cost being $24,000. That soon after the buildings were completed an agreement was made between the parties, which was carried out. That the possession of the property should be surrendered to Taylor, who was to collect the rents until proceeds thereof paid the principal and interest of his mortgage in full. Subsequently Taylor filed suit for foreclosure, claiming the sum of $7,000. Judgment was rendered, a sale had, and Taylor became purchaser for $9,300, and a deed was executed and delivered to him by the sheriff. It was further claimed that, while the foreclosure was in progress, it was agreed that Howland should make no defense, but allow a sale to take place; that Tay-

lor should still hold the property as security for payment of the mortgage debt, and, when the rents had been sufficient for that purpose, reconvey the premises to Howland; that under this agreement Taylor purchased, and after remaining in possession some time, desired his money and requested Howland to find some one to advance it; that Howland thereupon informed Blake and Elliot of the facts as above, and that, at his request, they advanced the necessary amount, and a conveyance was made by Taylor to them, but upon the agreement that they were only to retain the property until the rents paid them for their outlay, and that they would then reconvey to Howland. Taylor was dead at the time suit was instituted, but Blake and Elliot answered denying all equities, and the bill was dismissed by the lower court. On appeal this Honorable Court affirmed the decree below. Referring to the alleged agreement, as set up in the bill of complaint, the Court says (page 628):

> "Unless the equity of redemption of Howland was kept alive by the alleged agreement with Taylor, he had no interest which could sustain a parol agreement by the defendants to buy the property for his benefit and convey to him when required. Such an agreement is one creating by parol a trust or interest in lands, which cannot be sustained under the Statute of Frauds. It is a naked promise by one to buy lands in his name, pay for them with his own money, and hold them for the benefit of another. It cannot be enforced in equity, and is void;" also—
>
> Purcell *vs.* Minor, 4 Wall. 513.

(*b*) If, however, it be contended that something in the nature of a trusted was engrafted upon the holding of the defendants, should the evidence support the alleged agreement, this contention must also fail, for the seventh section of the statute provides:

> "All declarations or creations of trust or confidences, of any lands, tenements, or hereditaments,

> shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

The trust sought to be raised is not the resulting trust expressly reserved from the operation of the statute by the terms of the statute itself. That resulting trust is one arising by implication or construction of law. The trust alleged here is an *express trust* created by *express agreement* to that effect by the parties themselves, as says the Court of Appeals (Record 119):

> "If the statute may be avoided or evaded by designating an agreement as a trust, it is difficult to see wherein it can be enforced at all. Assuredly, no better illustration of the propriety of the statute could be afforded than the present case and no more appropriate opportunity 'for its application.'"

In Parker *vs.* Bodley, 4 Bibb, 102, the court said (103):

> "If the trust is considered as created by the agreement of the parties, if it does not come within the letter, that liberality of construction just mentioned, which is alone calculated to prevent the mischiefs intended to be prevented by the statute, *emphatically* requires it should be brought within the influence of the statute. . . . It is evident the trust in the present case, if it can be so denominated, is one created by contract, and is consequently within the statute."

That case was an agreement between two parties that one should make a purchase of land for the joint benefit of both; one made the purchase, and it was then agreed that the other should advance half of the money and be equally interested in the purchase, and it was argued that, in order to carry the transaction into effect, it should be considered as a trust, and not as a contract for a sale of

half the land, because in the latter view, the fourth section of the Statute of Frauds would prevent any remedy upon it.

It is, and was, undoubtedly the desire on the part of the plaintiff in the present suit to avoid the operation of the fourth section that led to the effort, in the amended bill, to change the alleged agreement into a sort of trust holding.

See also Chiles *vs.* Woodson, 2 Bibb, 71, where land had been conveyed by one party to another in trust for the grantor, and upon an agreement that the grantee should reconvey to any one to whom the grantor might afterwards sell. Here the court treated the transaction as a contract for land, and, there being no written evidence of the agreement, denied relief in equity on the ground of the statute.

Brown Statute Frauds, Sec. 80.

Dorsey *vs.* Clark, 4 H. & J. 556.

In considering cases presented of a contrary doctrine, it is well to remember that in Kentucky and Virginia the seventh section of the statute is not in force, and that in Pennsylvania no part of the statute is re-enacted except the first three sections, which relate to the actual conveyance of land.

Brown on Statute of Frauds, Secs. 80, 81.

There is certainly no circumstance of the present case that could incorporate upon the alleged agreement any of the features of a resulting trust. It possesses none of the characteristics of such. The property was not conveyed by the plaintiff to the defendants in consequence of misrepresentations or fraud, nor was the consideration for the purchase paid by the plaintiff. The sale was made with the consent of the plaintiff, by a third party, under a duly excuted trust and the consideration therefor proceeded alone from the defendants.

It is further submitted that where facts charged in a bill in equity are fully denied in the answer, there can be no decree against defendants on the evidence of a single wit-

ness without corroborating circumstances to supply the place of such a second witness. The witness Purcell does not aid the plaintiff, and the circumstances of the case bear out the contention made by the defendants. The court will, under no circumstances, engraft a trust upon a holding unless it be absolutely necessary from the nature of the case. As was quoted with approval by the Court of Appeals of Maryland in Groff *vs.* Rohrer, 35 Md. 336, from Cook *vs.* Fountain, 3 Swanstan, 591:

> "There is a good, general, and infallible rule that goes to both of these kinds of trusts (express or implied); it is such a general rule as never deceives, a general rule to which there is no exception, and that is this: The law never implies, the court never presumes, a trust but in cases of absolute necessity. The reason of this rule is sacred, for if chancery do once take liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is opened to Lord Chancellor to construe or presume any man in England out of his estate; and so at last every case in court will become *casus pro amico.*"

III.

It is further claimed that even should such an agreement as alleged be established to the satisfaction of the court the claim is now stale—barred by the *laches* of the plaintiff—and will not be enforced by an equity court.

It will be observed that over fifteen years had elapsed between the date of the transfer of the property to the Kenglas and the bringing of the present suit; during fourteen of which the defendants had been in undisturbed and undisputed possession; such possession relinquished to the defendants *on notice from them in writing, claiming ownership.* No excuse is given by the plaintiff for his course in thus supinely resting, while his rights were being frittered away, if any he had, save his alleged confidence in the parol promise of the defendants, and his poverty and consequent

inability to prosecute a suit for the enforcement of his interests. The notice to quit—acquiesced in by Levis—was sufficient to put the latter upon inquiry and give unmistakable notice of claim of adverse title. It was a positive demand upon him to deliver up the premises to others, claiming under paramount interest. He cannot plead ignorance of its meaning, for he obeyed its mandate and admitted its authority. The lame excuse now presented is not worthy of consideration. The sale to Hume was an additional notice to him of the claimed ownership on the part of the Kenglas, and still, with full knowledge, we find the plaintiff making no move whatever to assert his alleged equity. Can he now invoke the aid of this court?

In Speidel *vs.* Henrici, 120 U. S. 387, Mr. Justice Gray says:

> "Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. A court of equity, said Lord Camden, 'has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; when these are wanting the court is passive and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court.' This doctrine has been repeatedly recognized and acted on here."

It will be borne in mind that in this case many of the parties who could, if living, testify as to the real facts of the case, have long since died: The trustee, Weaver; the counsel who transacted the proceedings. Mr. Cassin; and the alleged witness to the conversations, Mr. Hume. During their lives no step is taken by the plaintiff, and it is only when their lips are sealed and their testimony is un-

available, that he presents his claim. In Brown *vs.* County of Buena Vista, 95 U. S. 161, the court declares:

> "The law of laches, like the principal of the limitations of actions, was dictated by experience, and is found in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof. The rule which gives it effect prescribes its necessity to the peace, repose, and welfare of society—a departure from it would open an inlet to the evils intended to be excluded."

And in the case, so well known in this jurisdiction, of Hammond *vs.* Hopkins, 143 U. S. 250, the court laid down the doctrine in no uncertain language.

> "No rule of law is better settled, than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred."

And the chief justice adds, page 274:

> "Where the seal of death has closed the lips of those whose character is involved, and lapse of time has impaired the recollection of transactions and impaired their details, the welfare of society demands the rigid enforcement of the rule of diligence."

The excuse of poverty is equally insufficient. This gives no standing in court. In Leggett *vs.* Standard Oil Co., 149 U. S. 294, the court says:

> "No sufficient reason is given for this delay in suing. It is sought to be excused on the ground of the plaintiff's poverty during this period, but in the case of Hayward *vs.* National Bank, 96 U. S. 611, 618, this court said that a party's poverty or pecuniary embarrassment was not a sufficient excuse for postponing the assertion of his rights."

And in the case just referred to, the court held that fifteen years' delay in seeking recovery upon a parol promise to compensate complainant was laches, declaring that—

> "This lapse of time not only constitutes a bar, such as the Statute of Limitations interposes, but shows such laches as will clearly preclude any right to relief."

In Naddo *vs.* Bardon, 51 Fed. Rep. 495, Mr. Justice Brewer, laying down the same doctrine, says that poverty is no excuse, and pays (page 497) a very just tribute to the readiness of the legal profession, at all times, to champion the poor man's cause, declaring that—

> "No man who has a just claim, and makes an effort to assert it, will ever fail of securing the needed professional assistance. The courts are always open, and the lawyers are always willing and at hand; and if he fails to establish his rights, it is because he does not make an effort to assert them."

The Court, in view of the uniform decisions of the Supreme Court of the United States, committed no error in refusing to permit the filing of the proposed amendment; which presented no additional excuse for the laches of the plaintiff, and presented no case which should not have been dismissed, had demurrer been interposed. Nor can the claimed illiteracy of the plaintiff avail him as an excuse.

> "Allegations of general ignorance of things, the knowledge of which is easily attainable, is insufficient to set into action the remedies in equity. McQuidd *vs.* Ware, 20 Wallace, 14. Nor upon well settled equitable rules can his plea of poverty and inability to pay the expenses of litigation necessary to enforce his rights, avail him."
>
> Naddo *vs.* Bardon, 47 Fed. Rep. 788.

Also—

De Estrada *vs* San Felipe Water Co., 46 Fed. Rep. 280.

Even had there ever been a right of action in the plaintiff, his laches and acquiescence for so great a period would debar him from assistance in a court of equity.

In conclusion we again refer to the language used on this point by the court below (Rec. 120):

> "The doctrine by which the present case is to be governed is too well known and has been too frequently stated by the courts to require much citation of authority. But we may refer to Hammond *vs.* Hopkins, 143 U. S. 250; Speidel *vs.* Henrici, 120 U. S. 387; Brown *vs.* Buena Vista, 95 U. S. 161; Sullivan *vs.* Railroad Co., 94 U. S. 806; Richard *vs.* Mackall, 124 U. S. 183."

It is respectfully submitted that the decision of the Court of Appeals should be affirmed.

J. HOLDSWORTH GORDON,
Counsel for Appellees.